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MARYLAND ASSOCIATION OF THE JUDGES OF THE ORPHANS' COURTS

Bill No.: Senate Bill 467
Title: Estates and Trusts - Administration of Estates - Payment of Commissions and Attorney's Fees
Committee: Judicial Proceedings
Hearing Date: February 10, 2021
Position: Recommend Unfavorable Committee Report

COMMENTS:

The Orphans' Court, as Maryland's probate court, oversees the administration of decedents' estates. "[It has the jurisdiction to] conduct judicial probate, direct the conduct of a personal representative, and pass orders which may be required in the course of the administration of an estate of a decedent." MD Est & Trusts Code § 2-102(a). Probate is the legal process of transferring property from the estate to the heirs and legatees.

During the ordinary course of the administration of a regular estate (an estate having a value over \$50,000.00), the Orphans' Court reviews estate accounts, petitions for personal representative's commissions, and petitions for attorney's fees. If all requirements have been met, then the Court signs Orders approving the accounts and granting commissions and fees. If the Court notices discrepancies or has questions, then the Court may call for a hearing.

In awarding personal representative's commissions and/or attorney's fees, the court makes its determination based on various factors, including, but not limited to, the ease or complexity of the estate, how long the estate has been opened, and whether there was litigation.

Pursuant to Estates & Trusts Article § 7-601:

ESTATES AND TRUSTS ARTICLE § 7-601 COMPENSATION OF PERSONAL REPRESENTATIVE AND SPECIAL ADMINISTRATOR

- (a) Right to compensation. -- A personal representative or special administrator is entitled to reasonable compensation for services. If a will provides a stated compensation for the personal representative, additional compensation shall be allowed if the provision is insufficient in the judgment of the court. The personal representative or special administrator may renounce at any time all or a part of the right to compensation.
- (b) Computation of compensation. -- Unless the will provides a larger measure of compensation, **upon petition filed in reasonable detail** by the personal representative or special administrator **the court may allow** the commissions it considers appropriate. The commissions may not exceed those computed in accordance with the table in this subsection. (Emphasis added).

If the property subject to administration is:

The commission may not exceed:

Not over \$ 20,000..... 9%

Over \$ 20,000..... \$ 1,800 plus 3.6% of the excess over \$ 20,000

If the personal representative has retained the services of an attorney, then the attorney is also entitled to be paid from the estate.

Estates & Trusts Article § 7-602 provides:

ESTATES AND TRUSTS ARTICLE § 7-602 COMPENSATION FOR SERVICES OF AN ATTORNEY

- (a) In general. -- An attorney is entitled to reasonable compensation for legal services rendered by him to the estate and/or the personal representative.
- (b) Petition. -- **Upon the filing of a petition in reasonable detail** by the personal representative or the attorney, **the court may allow** a counsel fee to an attorney employed by the personal representative for legal services. The compensation shall be fair and reasonable in the light of all the circumstances to be considered in fixing the fee of an attorney. (Emphasis added).

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- (c) Considered with commissions. -- **If the court shall allow a counsel fee to one or more attorneys, it shall take into consideration in making its determination, what would be a fair and reasonable total charge for the cost of administering the estate under this article**, and it shall not allow aggregate compensation in excess of that figure. (Emphasis added).

Maryland Rule 6-416(a)(1) states that petitions for fees and/or commissions must include “the amount of all fees or commissions previously allowed, the amount of fees or commissions that the petitioner reasonably estimates will be requested in the future, the amount of fees or commissions currently requested, the basis for the current request in reasonable detail, and that the notice [to interested parties] required by subsection (a)(3) of this Rule has been given.”

The Notice required announces that “[u]pon the filing of a petition, the court, by order, shall allow attorney's fees or personal representative's commissions **as it considers appropriate**, subject to any exceptions [filed by an interested party].” (Emphasis added).

As the language of Estates & Trusts Article § 7-604 currently reads, even if there is written consent to commissions and fees from all interested persons, the Court still may review.

The Consent form itself provides that the Court maintains the ability to review:

I understand that the law, Estates and Trusts Article, § 7-601, provides a formula to establish the maximum total commissions to be paid for personal representative's commissions. If the total compensation for personal representative's commissions and attorney's fees **being requested** falls within the maximum allowable commissions, and the request is consented to by all unpaid creditors who have filed claims and all interested persons, this payment **need not be** subject to review or approval by the Court. (Emphasis added).

In other words, personal representatives and attorneys are still asking the Court for fees and commissions, which will be noted on estate accounts as an expense of the estate, since the Court maintains the authority to approve accounts. However, the details of how the commissions and fees were arrived do not need to be reviewed by the Court via petitions otherwise required because of the Consent. The Consent does not state that the payment will not be subject to Court review, just need not be. The use of a Consent simply negates the necessity of meticulous petitions.

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Upon review of the terms of the Consent, note that it is only valid if the request for commissions and fees falls within the statutory limit. Sometimes the attorney's calculation is wrong, either based on an incorrect estate valuation or mathematical error. The proposed change would not allow the Court to correct the mistake.

Assuming a calculation is correct, there may be times that the estate is extremely simple and the personal representative waives commissions. Even if the estate is large, comprised of a home with no mortgage and a substantial bank account, the work on it can be simple. Simple administration would not warrant the large commissions that would be the maximum calculated on the value of the assets. The nature of the statutory maximum would simply become a fee.

An automatic requirement that the Court be stripped of its ability to review requests to take money from an estate is contrary to well-settled statutory and case law. The appellate courts have repeatedly held that the determination of the amounts of fees and commissions is at the sound discretion and judgment of the Orphans' Court. See *Goldsborough v. DeWitt*, 169 Md. 463, 473–74, 182 A. 324 (1936); *Gradman v. Brown*, 183 Md. 634, 39 A.2d 808 (1944); *American Jewish Joint Distribution Committee v. Eisenberg*, 194 Md. 193, 199-200 (1949); *Kenny v. McAllister*, 198 Md. 521, 84 A.2d 897 (1951); *Dessel v. Goldman*, 231 Md. 428, 190 A.2d 633 (1963); *Lusby v. Nethken*, 262 Md. 584, 585 (1971); *Riddleberger v. Goeller*, 263 Md. 44, 282 A.2d 101 (1971); *Wright v. Nuttle*, 267 Md. 698 (1973); *Wolfe v. Turner*, 267 Md. 646, 299 A.2d 106 (1973); *Att'y Griev. Comm'n v. Owrutsky*, 322 Md. 334, 587 A.2d 511 (1991); *Beyer v. Morgan State Univ.*, 369 Md. 335, 353 (2002); *Peterson v. Orphans' Court for Queen Anne's County*, 160 Md. App. 137, 862 A.2d 1050 (2004); and, *Piper Rudnick LLP v. Hartz*, 386 Md. 201, 216 (2005).

We assert that allowing the payment of commissions and fees without the ability of court review, even through consent, impedes on the express discretion of the court. That oversight exists to protect the interests of not only the elderly, but also minor children and overall those who are grieving.

Therefore,

We recommend an Unfavorable Committee Report for Senate Bill 467